95-1094

NO. _____

Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1995

DARLENE BANFIELD, Executrix of the Estate of
of Harlow F. Banfield; et al.,
Petitioners,

v.

KENNETH W. TURNER, et al.,
Respondent.

Petition For A Writ Of Certiorari From The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

INTRODUCTORY STATEMENT

The fiduciaries (the Respondents) of a qualified defined benefit plan permitted an assignment of income to fund the plan. It is admitted the assigned income is not income of the plan sponsor/employer. The assigned income is that of a separate and distinct entity that has its own employees not covered by the plan.

1. Should the Respondent have been granted a motion for summary judgment when the Petitioner presented a genuine issue of material fact as to whether transfers of funds to a qualified plan

were conducted pursuant to an assignment of income as contented by Petitioner or as a leased employee as contended by Respondent?

2. Should the Respondent have been granted a motion for summary judgment under the standard that Respondent, as movant for the summary judgment, was entitled to judgment as a matter of law, where as a matter of law assignments of income from a sole proprietorship to an unrelated corporate pension plan are not permitted?

3. Should a plan administrator and accountants who (1) has been given full discretionary authority, (2) upon whom complete reliance is placed, and (3) have acted as fiduciaries be held liable

for breach of duty, to the participant/ assignor-of-income in establishment of a qualified pension plan that permits the plans acceptance as a contribution, income that is assigned and is not the profits of the plan sponsor and discriminates against the employees of the assignor of the income; that is not earmarked for the sole benefit of the assignor of the income; that is co-mingled and used to pay the benefits of all plan participants?

5. Should a deficiency in plan assets be allocated to the two highest paid owner/participants or should a deficiency in plan assets be allocated ratably over all plan participants?

6. Should the repayment of a plan loan

include, in addition to the repayment of the loan principal and interest, an additional amount which would include the plans lost opportunity to reinvest the previously unpaid interest?

7. Should fiduciaries decision be deemed arbitrary or capricious that discriminates against a plan participant/assignor-of-income to require him to contribute to his own pension benefits when all other beneficiaries have their benefits contributed by the plan sponsor?

8. Should a trial court require the nonmoving party to a summary judgement to respond when the movant has failed to respond to discovery on questions of disposition of bank account balances?

9. Should, in the determination of summary judgement that an absence of evidence exists, the nonmovant not only be credited with presentation of evidence on the issue of assigned income as admitted in Respondent's deposition but have evidence weighed most favorably in its favor and deemed admitted when the remaining multiple respondents failed to present any evidence in opposition? And is it an abuse of discretion in failing to grant the nonmovant with presentation of such evidence?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

1. Appellants. In addition to the petitioner Darlene Banfield, Executrix of the Estate of Harlow F. Banfield, the following persons were joint appellants in the appeal to the United States Court of Appeals for the Sixth Circuit:

a. Darlene Banfield

2. Appellees. In addition to the respondent Kenneth W. Turner, the following persons were joint appellees in the appeal to the United States Court of Appeals for the Sixth Circuit:

a. William L. Miller

b. Francis P. Gallagher

c. Thompson Plan Administration Company

d. Peter Visnic

e. Crable, Visnic & Miller

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE BANFIELD, EXECUTRIX

OF THE ESTATE OF HARLOW F. BANFIELD,

ET AL.,

Petitioners,

v.

KENNETH W. TURNER, ET AL.,

Respondents.

The petitioner, Darlene Banfield, Executrix of the Estate of Harlow F. Banfield, et al., by counsel, respectively prays that a writ of certiorari issue to review the judgement and opinion of the United States Court

of Appeals for the Sixth Circuit (the "Court of Appeals"), entered in the above-entitled case on Sept. 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgement the petitioner seeks to have reviewed, is unpublished and is reprinted in the separate appendix to this petition, (Appx. A). The relevant rulings by the United States District Court for the Northern District of Ohio (the "District Court"), namely, the ruling granting the respondents motion for summary judgement, are likewise unpublished and are reprinted in the appendix,(Appx. B).

STATEMENT OF JURISDICTION

The District Court obtained subject

matter jurisdiction by virtue of 28 U.S.C. 1132 and 1331 in that this matter relates to plan benefits payable under an employee welfare benefit plan enacted pursuant to ERISA, 29 U.S.C. 1001, et seq.

The Court of Appeals obtained appellate jurisdiction over the final judgement of the District Court in this matter pursuant to 28 U.S.C. 1291 inasmuch as this is an appeal from a summary judgement by the District Court dismissing with prejudice all claims of petitioners, and a final order pursuant to Rule 54(b), Federal Rules of Civil Procedure.

This Court has discretionary appellate jurisdiction over the final

judgement of the Court of Appeals in this matter pursuant to 28 U.S.C. Section 1254(1). The judgement of the Court of Appeals was rendered in an unpublished opinion of Sept. 12, 1995. The petitioner and other joint appellants filed a petition for rehearing on Sept. 28, 1995, which the Court of Appeals denied on October 12, 1995. (Appx. C)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The following statutes, rules and guidelines govern the review of this case on writ of certiorari:

1. Employees Retirement Income

Security Act of 1974 (ERISA) 29 U.S.C. Sections 1002(6),1103(c)(1), 1103(c)(2)(A)(ii) and 1132(a)(1)(B). Regulations thereto 29 C.F.R. Section 2510.3-3(c)(1). ERISA found at 1982-2 C.B. 462.

2. Internal Revenue Code Sections 401(a), 413, and 414(N).

3. Treasury Decisions (T.D. 8179, 1988-1 C.B. 122 at Example (4).

4. Bureau of National Affairs (B.N.A.) Tax Management Portfolio No. 371 p. A-6.

STATEMENT OF CASE

The District Court in granting summary judgment held Petitioner contributed "private practice income" to pension contributions, implicit in the

holding is that the District Court must have found that the contribution of the private practice income to the pension as proper under the Internal Revenue Code and ERISA.

It is uncontroverted that Dr. Banfield had two sources of income from 1977 to 1988. The first source of income was from an anesthesiology practice - Anesthesiology Association of East Liverpool Ohio ("AAELO") and the second source of income was from a pediatrics practice ("Private Practice"). Each practice was separate and distinct, having its own office, separate employees, were physically segregated, had separate check books and accounting records. From the

commencement of the pediatrics practice until 1977, Dr. Banfield separately reported his pediatrics practice's income on Schedule C of Form 1040. On or about 1977, and in conjunction with the establishment of the AAELO defined benefit plan and the recommendation of the plan administrator Thompson Plan Administration/Gallagher with the ascent William Miller, Peter Visnic, and Crable, Visnic and Miller, Dr. Banfield's Form 1040 preparers who were also the accountants for AAELO, the private practice income was not reported on Dr. Banfield's Form 1040 Schedule C but transferred to the AAELO. The nature of the transfer whether by assignment or via corporate leased employee of Dr.

Banfield to his private pediatrics practice, is a genuine issue of material fact which both lower courts failed to recognize as existing, and which precludes the granting of summary judgment.

The complaint lists, among other causes of action, the improper funding of defined benefit plans.

REASONS FOR GRANTING THE WRIT

For the following reasons this petition should be granted.

I.

LEASED EMPLOYEE v ASSIGNMENT OF INCOME

The judgement of the Court of Appeals should be reviewed by this Court because if failed to recognize a genuine

issue of material fact that a plan participant was not a leased employee but an assignor of income which would preclude the grant of summary judgement.

I.R.C. Section 413 Definitions and Special Rules Section 414(n) Employee Leasing: ". . . (2) Leased Employee - the term "leased employee" requires that such services are (A) provided pursuant to an agreement (emphasis ours) between the recipient and the "leasing organization," and (B) such person has performed such services for the recipient on a substantially full-time basis for a period of at least 1 year, and (C) such services are a type historically performed, in the business field of the recipient, by employees."

Petitioners established per Gabbert Deposition (Appx E.,) separate office and employees (p 5,6,8 13-15,36); transfer of funds from private practice to AAELO p 8,9 18); Dr. Turner never

deposited like checks (p12); that Dr. Banfield had constant control of his private practice(p48); was part-time at the private practice (p24) and that his duties were not historically performed by employees, since he was its sole licensed practitioner (p4,6,24); Therefore, Dr. Banfield could not be a leased employee not having met the requirements of the I.R.C. 414. Nor did Respondents present any evidence to support a leased employee arrangement. Respondent Gallagher deposition on the issue of leased employee states at (Appx. E, Gallagher Dep.P31 L4, L15; P32 L5) Line 4 Q: "Was there a management agreement drawn up?" A:"I have no idea if one was done." Line 15 Q: "Do you

have any other evidence that would support your assertion that Dr. Banfield was a leased employee or under a management agreement?" A: "That was just a proposal. I don't know what was done." P32 L5 Q: Is the phrase leased employee or management contract used in Plaintiffs' EXHIBIT 1 [Thompson Plan Proposal]? (Appx. E) A: "I don't see it mentioned anywhere, no."

Likewise Mr. Miller (Appx E. P26 L2-6) supports the above Q: To your knowledge was there any written documentation that would memorialize the assignment of income between Dr. Banfield's private practice to AAELO? A: "I did not see a written document."

The presentation of the above

creates the genuine issue of material fact that an assignment of income occurred. The materiality and relevance of these facts are that assigned sole proprietorship income can not be contributed to a separate corporate plan as explained below.

II.

ASSIGNMENT OF INCOME DOCTRINE

The judgement of the Court of Appeals affirming granting of the summary judgement should be reviewed by this Court because it conflicts with the decisions of this Court and other Circuits over an important question in federal income taxation and funding of qualified pension plans under ERISA.

Pre-dating both the establishment

of the pension plan in question and the promulgation of the rules for leased employees, is the so-called Assignment of Income Doctrine first described by Justice Holmes in Lucas v Earl 281 U.S. 111 (1930).

A general description of the doctrine is an attempt to shift income from one person or entity to another person or entity to evade tax or have the income paid by another person in a lower tax bracket.

Supreme Court stated that "... The Revenue Act ..., imposes a tax upon the net income of every individual including income derived from salaries, ... for personal services ... of whatever kind and in whatever form paid. ..." The

Court's rational is that "... there is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements (emphasis ours) and contracts however skillfully devised to prevent the salary when paid from vesting even for a second (emphasis ours) in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

The Sixth Circuit stated that income can not be assigned if the

ownership of the underlying income producing asset is retained as stated in Martuccio v.Comm., (1994 CA 6) 1994 US App Lexis 19204.

Petitioner states that the Court of Appeals decision herein is in conflict with both the above cited cases as Dr. Banfield earned this income and did not relinquish control over his private practice.

In support thereof petitioner notes the following facts were established in the record in Mr. Miller's Deposition:

(a) (Appx E) Miller Dep. Page 13, A: My understanding was that Dr. Banfield would assign his private practice income to the corporation." In fact, at nine different times, the

deposition referred to the arrangement as an assignment. Page 17 L1,4,9 ; Page 26 L3,4,6,9; Page 27 L10. He further stated at Page 17 "... prior to the assignment of the income to the corporation, the private practice income would have been reported on his 1040? A:"yes" Q: After the assignment of income, did you report that income on his 1040? A: " Not on his 1040, no."

(b) Mr. Gallagher's Deposition Page 39 and 40 (Appx E) states the motivation was to shelter the income from tax.

III

ASSIGNMENT TO A PLAN NOT ALLOWED

The judgement of the Court of Appeals affirming the summary judgement should be reviewed by this Court because

as a matter of law diversion to a pension plan is an assignment of income.

This Court in United States v. Basle, 410 U.S. 441 (1973) reversing both lower courts stated that their decision was "incompatible with basic principles of income taxation (of assignment of income) as developed in our prior cases, we reverse."

Basle, involved Permanente, a partnership of physicians which provided medical services to Kaiser. Kaiser agreed to pay the partnership Permanente directly plus pay into a retirement plan to benefit Permanente's partners.

The Supreme Court in an opinion delivered by Mr. Justice Powell stated:

"We hold that the courts below erred and that respondents were properly taxable on the partnership's retirement fund income. This conclusion rests on two familiar principles of income taxation, first, that income is taxed to the party who earns it, and, that liability may not be avoided through an anticipatory assignment of that income, (emphasis ours)... ".

" [The] fundamental rule, which this Court has described as, " the first principle of income taxation: that income must be taxed to him who earn it." Commissioner of Internal Revenue v. Culbertson, 337 U.S. 733, 739-740, (1949), " The entity earning the income - whether a partnership or an individual taxpayer [emphasis ours] cannot avoid taxation by entering into a contracted arrangement whereby that income is diverted to some other person or entity. Such arrangements, known in the tax law as "anticipatory assignments of income," have frequently been held ineffective as a means of avoiding tax liability. The seminal precedent, written 40 years ago is Mr. Justice Holmes' opinion for a unanimous Court in Lucas v. Earl (citation omitted) ". . . The principals of Lucas v. Earl, that he who earns income may not avoid taxation through anticipatory arrangements no matter how clever or subtle, has been

repeatedly invoked by this Court and stands today as a cornerstone of our graduated tax system... "

"... Permanente's agreement with Kaiser, whereby a portion of the partnership compensation was deflected to the retirement fund, is certainly within the ambit of Lucas v. Earl. The partnership earned the income and, . . . was responsible for its diversion into the trust fund..." (emphasis ours).

"...that the principle of Lucas v. Earl may not be so easily circumvented. Kaiser's motives for making payments are irrelevant (emphasis ours)..."

There are no exceptions to the Assignment of Income Doctrine and assignment occurs even if it is to a pension plan. This Court has held in Basle that an assignment of income to a pension plan still retains its character as an assignment. The Court of Appeals erred in failing to recognize the

assignment (Appx A.), " the private practice income flowed through the pension plans. "

D.

PLANS CAN NOT ACCEPT ASSIGNED INCOME

The judgement of the Court of Appeals affirming the motion for summary judgement should be reviewed by the Court because as a matter of law pension plans may only accept "employer" contributions.

The limitation on contribution to a pension plan is found in I.R.C. Section 401 (a) and (c) Requirements for Qualification states: "... (c) of contributions are made to the trust by such employer, or employees, or both ..." (emphasis ours)."

The limitation of only "employer"

contributions are repeated in the I.R.C.

(1) I.R.C. Reg. 1.401-1(a)(2) "...A qualified pension . . . is a defined written program (emphasis ours) ... established and maintained by an employer." (emphasis ours)

(2) I.R.C. Reg. 1.401-1(a)(3)(ii)

(ii) "It must be apart of pension plan established by an employer (emphasis ours) for the exclusive benefit of his employees..."

Nor may the plan discriminate against participants for contributions or benefits. See I.R.C. Reg. 1.401-1 et seq. (Appx D). And all the surrounding and attendant circumstances and the details of the plan will be considered.

The Petitioner argues that income upon which an assignment is being attempted contains many tax attributes. The first, as noted in Lucas, as being required to be reported in the

assignor's income. Second, since the assignee-employer never had the right itself to receive the payments made into the trust as current income it is not income of the "employer". Finally, as prescribed by I.R.C. Reg. Sect.1.401-10(e) Definition of employer -" a sole proprietor is considered his own employer". Therefore per I.R.C. Sect 401 et seq. only an "employer" may contribute to a qualified plan, and a sole proprietor can not contribute as an "employer" to the plan of another employer that is "AAELO".

Also this plan did not elect to permit employees to make contributions to this plan. See Gallagher Depos. (Appx. E.) where it is admitted that

despite the assertion that the private practice income being for the sole benefit of Dr. Banfield, but the plan was a defined benefit plan, that plan contributions benefit all beneficiaries. (Appx. E Gallagher Page 55,56,65); that no separate accounts were established for a participant (Page 62); Dr. Banfield made no separate voluntary employee savings option contributions (Page 64) and if he had they would be separately segregated(Page 64). Also notes that the concept of separately segregated benefits is not consistent with a defined benefit plan.

E.

THE DECISION BY PLAN ADMINISTRATORS TO

ALLOW ASSIGNED INCOME IN A DEFINED BENEFIT PLAN IS ARBITRARY AND CAPRICIOUS

The plan administrator and accountants conduct as fiduciaries is arbitrary and capricious. The intent of the plan was to have the private practice income attributed to the sole benefit of Dr. Banfield (Appex E. Gallagher page 55). This requiring them to perform their fiduciary duties in the best interest of Dr. Banfield.

The Court of Appeals misconstrued the Moskal Report and refused to give any weight to the Herr Affidavit nor reconsider the Jaras Affidavit (Appx. E) which support petitioner. Note the report does not contain facts to support the leased employee theory nor indicate

compliance with the I.R.C. The report was to see on an actuarial basis if the plan formula to compute benefits were correct and the Court of Appeals affirmed this believe to track the flow of the funds. Like the Moskal report, the Court of Appeals and District Court decision failed to provide any analysis of the applicable tax or pension law.

The fact that the plan administrators and accountants, as fiduciaries, conceptualized a defined benefit plan which accepts assigned income not earmarked, and which could not be in a defined benefit plan, for the assignor clearly meets an arbitrary and capricious standard. It is arbitrary and capricious, and an abuse

of discretion to decide that (a) person to contribute over $274,000 of his own money and get the same benefit in a defined benefit plan, as he would get if he did not contribute any funds; (b) instituting a plan where at its inception the plan fiduciaries know the corporate sponsor will underfund and that underfunding will be paid by only one of the plan participants; or (c) have one employee pay for his own benefit and all other employees obtain a benefit from the corporate sponsor, is discriminatory in effect, arbitrary as between participants inter se and capricious. Is this Court going to condone such acts of plan fiduciaries?

The issue of misappropriation is

misconstrued by the Court of Appeals. It is not one of a smoking gun. The issue is should the fiduciaries have realized the effect that a defined benefit plan would not provide a greater benefit to a beneficiary/assignor of income? And now coming to the realization of the effect at the time of plan distribution, where funds misappropriated from the intended beneficiary, Dr. Banfield? The "62% equals 62%" notion is the classic comparing of apples and oranges: The private practice income is not included in the actuarial contributions. (See Appx. E Moskal Jaras Report.) The Court of Appeals correctly noted that Moskel Report is an Actuarial Report, that is the defined benefits of

I.R.C. 401 are longevity of service, compensation rates, and ages, not compensation. Moskel states that Dr. Banfield got what he was due based upon those factors not because he contributed funds to the defined benefit plan.

F.

Due to page limitations the Petitioner appeals on all issues before the Court of Appeals .

CONCLUSION

It is the fatal flaw in the establishment of this plan to accept assigned income that creates a cause of action. For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Darlene Banfield, Executrix of the Estate of Harlow Banfield; Darlene Banfield

Date: 12/8/95 By: _____
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APPENDIX A

OPINION BELOW

Excerpted below the unpublished per curiam Opinion of the United States Court of Appeals for the Sixth Circuit in the appeal Darlene Banfield v. Kenneth W. Turner, et al., Record No. 94-3663, 94-3864, and decided September 12, 1995, before RYAN, BATCHELDER and MOORE, Circuit Judges. KAREN NELSON MOORE, Circuit Judge.

William Paul McGuire on behalf of Darlene Banfield, and Bernard Fineman argued on behalf of Kenneth W. Turner; Lawrence Springer on behalf of William L. Miller, Peter Visnic, and Crable, Visnic & Miller; and John C. Cubar on behalf of Francis P. Gallagher on behalf of

Thompson Plan Administration Company; on behalf of Peter Visnic; Crable, Visnic & Miller.

BEFORE: RYAN, BATCHELDER and MOORE, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. Plaintiffs appeal from the district court's order granting summary judgment to all defendants in this case, which involves claims of breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1001-1461. Plaintiffs also appeal from the district court's order denying their Rule 60(b) motion. We affirm the district court's orders.

I.

Darlene Banfield ("Mrs. Banfield") sued Dr. Kenneth W. Turner ("Turner"); Francis P. Gallagher ("Gallagher"); Thompson Plan Administration Company ("TPA"); William L. Miller ("Miller"); Peter Visnic ("Visnic"); and Crable, Miller & Visnic ("CMV") for alleged violations of their fiduciary duties under ERISA. Mrs. Banfield sued both in her capacities as executrix of her late husband's estate and as a beneficiary of his pension plan.

Dr. Harlow F. Banfield ("Dr. Banfield"), Mrs. Banfield's late husband, owned half of an incorporated medical practice called Anesthesiology Associates of East Liverpool, Ohio, Inc. ("AAELO").

Defendant Turner owned the other half of AAELO. Dr. Banfield also had a separate private medical practice. AAELO established two defined benefit pension plans in which both doctors participated and in which both doctors were named fiduciaries. Both doctors had to sign any checks drawn on the pension fund. Dr. Banfield apparently contributed income from his separate private practice into the AAELO fund. Mrs. Banfield alleges that Dr. Banfield contributed a total of $272,384 from his private practice income to the AAELO pension plans.

Defendants Miller, Visnic, and CMV provided accounting services to the AAELO plans. The accounting services included

tax return preparation and plan financial statements, participant disclosure statements, and actuarial statements. Defendants Gallagher and TPA provided administrative services to the AAELO plans.

Dr. Banfield retired from AAELO on October 29, 1988, and began receiving monthly payments from both plans. After Dr. Banfield's death on February 17, 1989, Mrs. Banfield continued to receive payments from the pension plans until April 1991. Mr. Banfield apparently became suspicious that she had not received all of the money to which she was entitled under the plans, because she hired the actuarial firm of Moskal, Jaras & Klein ("Moskal") to audit the plans.

Moskal concluded in its report to Mrs. Banfield that Dr. Banfield had received a percentage of the plans' benefits equal to the percentage of his contributions, which allocation was proper. The Moskal report also found that "[t]he private practice income did flow through to the pension plans." Mrs. Banfield's complaint contains three causes of action, all involving alleged breaches of fiduciary duty, and fraud against all defendants. The first cause of action also alleges that all defendants misappropriated Dr. Banfield's private practice income contributions. The second cause of action alleges that all defendants purchased an annuity for Turner in breach of their fiduciary duty

of independence. The third cause of action alleges that Turner, Miller and CMV breached their fiduciary duties by failing to collect repayment of loans made to Turner from the plan funds and allowing Dr. Banfield to make illegal contributions to the pension plans.

Defendants Miller, Visnic, Gallagher, TPA, and CMV based their motion for summary judgment on the ground that they were not fiduciaries under the plan and thus had no liability under ERISA. Defendant Turner moved for summary judgment on the ground that, although he was a fiduciary under ERISA, his actions with regard to the plan were reasonable and not arbitrary or capricious, and that he therefore could

not be held liable under ERISA.

The district court granted all of the defendant's motions for summary judgment. Although the district court found that there was a genuine issue of material fact about whether defendants Gallagher and TPA were fiduciaries, it held that summary judgment in favor of all defendants was appropriate because Mrs. Banfield had presented no evidence of fraud, misappropriation, breach of contract, or arbitrary and capricious action, and thus Mrs. Banfield had not met her burden of showing a genuine issue of material fact.

The district court's granting of summary judgment is reviewed de novo. Guarino v. Brookfield Township Trustees,

980 F.2d 399, 403 (6th Cir. 1992). An appellate court uses the same test used by the district court for determining whether summary judgment should be granted under Fed. R. Civ. P. 56(c), which requires that summary judgment must be granted if the pleadings, depositions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party is entitled to summary judgment if it shows that the non-moving party has failed to establish an essential element of its case upon which it would bear the ultimate burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986). In

order to avoid suffering summary judgment, the non-moving party must come forward with specific fact showing that there are genuine issue for trial and that the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-moving party cannot rest on its pleadings, but must present supporting evidence on issue upon which it has the burden of proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The evidence submitted by the non-moving party must be sufficient for a jury to be able to decide in its favor on those issues at trial. Guarino, 980 F.2d at 403; Coffey

v. Foamex L.P., 2 F.3d 157, 159 (6th Cir. 1993). However, the evidence and all inferences to be drawn from it must be construed in the light most favorable to the non-moving party. Kraus v. Sobel Corrugated Containers, Inc., 915 F.2d 277, 299 (6th Cir. 1990).

The district court was correct that Mrs. Banfield has not shown a genuine issue of material fact on the allegations of breach of fiduciary duty. The defendants supported their summary judgment motions with affidavits and deposition testimony. Defendant Turner supported his motion with the Moskal report. The Moskal report, which was commissioned by Mrs. Banfield, expressly stated that the private practice income

"flowed through" the pension plans and that Dr. Banfield received that to which he was entitled.

Mrs. Banfield presented no evidence that any fraud, breach of contract, or misappropriation occurred. She referenced deposition testimony in her response to the defendants' summary judgment motions, but the testimony did not support her claims. Mrs. Banfield also provided her own affidavit as support for her claims. However, her affidavit is not entitled to evidentiary weight because it contained mere conclusory restatements of the allegations in her complaint. Mrs. Banfield offered nothing more that her allegations to support her claims, which

is insufficient to meet her burden of producing evidence to oppose a summary judgment motion supported by evidentiary materials. See Fed. R. Civ. P. 56(e)(opposing party must respond to properly supported affidavit with "specific facts showing that there is a genuine issue for trial.").

Although Turner admitted he was a fiduciary, the district court granted him summary judgment because his actions were not arbitrary or capricious. A fiduciary's decisions will be upheld under ERISA unless they are arbitrary or capricious. Cutting v. Jerome Foods, Inc., 993 F.2d 1293, 1295-96 (7th Cir.), cert. denied, 114 S.Ct. 308 (1993); Pokratz v. Jones Dairy Farm, 771 F.2d

206, 208-09 (7th Cir. 1985). Fiduciaries are entitled to this level of deference only if the plan expressly provides them with discretionary authority. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) (fiduciary's decisions reviewed de novo unless plan gives discretion, in which case fiduciary's decisions are reviewed under more deferential standard); McDaniel v. Blue Cross & Blue Shield of Alabama, 780 F.Supp. 1363, 1364-65 (S.D.Ala), aff'd without op., 977 F.2d 599 (11th Cir. 1992). The record does not indicate whether the AAELO plans gave Turner such discretionary authority, but neither party has disputed that such authority exists in this case. Mrs. Banfield has

not put forward any evidence to create a genuine issue of material fact about whether any of Turner's decisions were arbitrary or capricious. Moreover, Mrs. Banfield has not even put forward any evidence of a fraud, misappropriation, or breach of contract by another fiduciary that Turner knowingly failed to stop. On this record, Mrs. Banfield simply has not carried her burden of coming forward with evidence sufficient to create a genuine issue of material fact, and thus summary judgment was correctly entered against her.

The district court's finding that no misappropriation occurred also requires dismissal of Mrs. Banfield's breach of independence claim that was base on the

purchase of the annuity for Turner. Since no misappropriation occurred, the purchase of the annuity was not a breach because it did not cause Turner to receive more than the amount to which he was entitled. Gallagher testified at deposition that the annuity was included in the calculation of Turner's benefits, and Mrs. Banfield provided no evidence to refute this testimony.

II

Mrs. Banfield also argues that the district court erred by not granting an oral hearing on the motions for summary judgment. Mrs. Banfield states that the district court's failure to hold an oral hearing somehow prejudiced her, but fails to explain how she was prejudiced. Rule

56 does not require an oral hearing on a motion for summary judgment. Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983); Chrysler Credit Corp. v. Cathey, 977 F.2d 447, 449 (8th Cir. 1992) (parties' right to be heard on summary judgment motion is satisfied by the opportunity to submit briefs and supporting affidavits). Moreover, even when summary judgment is improperly entered against a party, that party must demonstrate prejudice in order to obtain relief on appeal. See Yashon v. Gregory, 737 F.2d 547, 522 (6th Cir. 1984). Mrs. Banfield has not shown prejudice from the district court's failure to hold an oral hearing.

Finally, Mrs. Banfield argues that

the district court erred by "requiring the Appellant to respond to the Motion for Summary Judgment when the Appellee's [sic] had failed to complete discovery." Brief of the Appellant at Table of Contents. Mrs. Banfield's brief states that the missing discovery consists of "checking accounts of the pension plans and the tax returns of Dr. Turner." Brief of the Appellant at 38. However, Mrs. Banfield apparently received the disputed bank statements, which were attached to her Rule 60(b) motion. Mrs. Banfield did not state in that motion that the bank statements were newly discovered evidence. Mrs. Banfield had more than nine months to respond to the summary judgment motions and to press for

discovery. The record is devoid of any indication that she pressed for production of these documents after November 1993, more than three months before her summary judgment response was due. Because Mrs. Banfield did not press these claims, the district court and parties had no way of knowing that she believed discovery was incomplete. The district court did not abuse its discretion by requiring Mrs. Banfield to respond to the summary judgment motions more than nine months after the first one was filed, particularly since Mrs. Banfield did not bring any outstanding discovery to the court's attention.

III.

Mrs. Banfield appealed from the

district court's denial of her Rule 60(b) motion. The district court's judgment should be affirmed. The district court's denial of a Rule 60(b) motion is reviewed for abuse of discretion. United States v. Grable, 25 F.3d 298, 302 (6th Cir. 1994).

Mrs. Banfield filed her Rule 60(b) motion on the same day she filed her notice of appeal from the district court's order granting summary judgment to the defendants. A timely notice of appeal divest the district court of jurisdiction, with limited exceptions. Pittock v. Otis Elevator Co., 8 F.3d 325, 327 (6th Cir. 1993). Under Fed. R. App. P. 4(a)(4), a Rule 60(b) motion, if served within 10 days of the entry of

judgment, would toll the time for appeal, the notice of appeal would be ineffective until the Rule 60(b) motion was resolved, and the district court would retain jurisdiction to rule on the Rule 60(b) motion. Here, however, Mrs. Banfield did not serve her Rule 60(b) motion within the 10-day period. Therefore, the time for appeal was not tolled, the notice of appeal was timely and was effective when filed, and the district court was divested of jurisdiction to rule on the Rule 60(b) motion. Grable, 25 F.3d at 301 n.3 (Rule 60(b) motion not served within 10 days of judgment did not toll time for appeal).

Mrs. Banfield argues that her notice of appeal was filed only as a protective

measure because the district court had not ruled on her pending motion for extension of time to appeal. After both the Rule 60(b) motion and the notice of appeal were filed, the district court granted Mrs. Banfield's motion for extension of time to appeal. Mrs. Banfield asserts that the notice of appeal should have been held in abeyance to allow the district court to rule on the Rule 60(b) motion, even though Mrs. Banfield never moved to withdraw or dismiss her notice of appeal after the extension was granted. Mrs. Banfield's argument is meritless. Courts cannot be required to read parties' minds. When a party has filed a notice of appeal and takes no steps to dismiss the appeal,

courts must be able to assume that the party meant to file the appeal and live with its attendant consequences.

The district court's denial of Mrs. Banfield's Rule 60(b) motion was correct and thus was not an abuse of discretion.

For the reasons stated above, the district court's orders are AFFIRMED.

APPENDIX B

OTHER OPINIONS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEMORANDUM AND ORDER

This action arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 et seq. The Plaintiff, the Estate of Harlow F. Banfield, is the successor in interest to the rights or benefits of Harlow F. Banfield, an employee of and a plan participant under an employee pension benefit plan known as the Anesthesiology Association of East Liverpool, Ohio (AAELO). Plaintiff Darlene Banfield is

Harlow Banfield's beneficiary under this Plan. The Plaintiffs allege that Defendant Kenneth Turner was a fiduciary of the AAELO Plan because he acted as or controlled the administration and the plan sponsor. The Defendants Peter Visnic and William Miller, partners in Defendant Crable, Miller and Visnic, were the certified public accountants for AAELO. They prepared tax returns, reviewed, aided or assisted in preparation or distribution of all information regarding the Plan including financial statements, participant disclosure statements and actuarial statements. Defendants Francis Gallagher and the Thompson Plan Administration Company acted as actuaries and solicited,

sold or acted as agents for the sale of an annuity to the Plan.

The first cause of action constitutes claims for breach of contract, fraud and breach of fiduciary duty. Plaintiffs allege in the second cause of action that an annuity was purchased for Defendant Turner though the Plan. This purchase involved a known breach of independence to the Plan. Finally, in the third cause of action, Plaintiffs allege that after the death of Banfield, Defendants Turner, Visnic, Miller and Crable, Miller and Visnic conspired to mislead, misrepresent and conducted a fraud upon Banfield's beneficiaries and breached their fiduciary duties. This matter is before

the Court upon the motions for summary judgment filed by all Defendants.

Defendants William Miller, Peter Visnic, Crable, Miller and Visnic, Frances Gallagher and Thompson Plan Administration argue that they are not fiduciaries of the Plan and cannot be liable under ERISA. 29 U.S.C. Section 1132a(1)(B) allows a civil action to be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce rights under the terms of the plan or to clarify rights to future benefits. Liability for breach of fiduciary duty is found in 29 U.S.C. Section 1109. Also, 29 U.S.C. Section 1132(1) provides that the Secretary shall assess a civil penalty

against a fiduciary or any knowing participation in such breach by any other person. There does no appear to be any provision allowing a private cause of action against a person violating ERISA who is not a fiduciary.

The United States Supreme Court has recently held that 29 U.S.C. Section 1132(a)(3) allowing plan participants to bring civil actions to obtain appropriate relief does not authorize suits against non-fiduciaries who knowingly participate in a fiduciary's breach of duty. Mertens v. Hewitt Associates, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). ERISA allows equitable relief whereas the petitioners were requesting compensatory damages. Id. 113 S.Ct. at 2068. By not

providing for damages against non-fiduciaries, ERISA has eliminated the common law's joint and several liability for direct and consequential damages suffered by the Plan caused by persons who had no real power to control what the Plan did. Id. at 2072.

29 U.S.C. Section 1001(21)(A)provides in pertinent part:

A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or

indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The affidavits of Peter Visnic and William Miller establish that neither they nor the firm of Crable, Miller and Visnic had any discretionary authority or control respecting management or disposition of the plan's assets, nor did they render investment advice for a fee or other compensation or had any authority to do so and neither had any discretionary authority or responsibility in the administration of the Plan. William Miller filled out a form called a

Census Form that was sent to him by the plan administrator and he prepared the amortization schedules for the notes due the pension plan by Dr. Turner. He also prepared the general ledger, financial statements, corporate federal income tax return, annual franchise tax return for Ohio, the personal property tax return for the county and the city income tax return for the corporation. Peter Visnic states that he prepared the personal income tax returns for Dr. and Mrs Banfield. This conduct does not fit ERISA's definition of fiduciary.

Francis Gallagher's affidavit shows that neither he nor Thompson Plan Administration Company performed any conduct set forth in ERISA's definition

of fiduciary. However, Gallagher's deposition demonstrates that the plan administration may have exercised control respecting management or disposition of its assets. Thus, whether or not he and the Company were fiduciaries is an issue for trial.

Plaintiff has not presented any evidence controverting Gallagher and Thompson Plan Administration's assertion that they did not direct, act or conspire with regard to the acts complained of in the complaint. In accordance with the discussion below concerning Kenneth Turner, there is no indication of a misappropriation of Dr. Banfield's funds.

Kenneth Turner admits that he was a fiduciary of the Plan but contends that

he acted legally, appropriately and fairly with regard to the administration of the Plan and distribution of the Plan benefits. It has been held that a plan's denial of benefits may not be disturbed unless the action was arbitrary or capricious. Pokratz v. Jones Dairy Farm, 772 F.2d 206, 208 (7th Cir. 1985). A fiduciary or plan administrator's decision is to be upheld unless the plaintiff proves that the decision was unreasonable based on the facts. McDaniel v. Blue Cross Blue Shield of Alabama, 780 F.Supp. 1363, 1365 (SD Ala 1992); aff, 977 F.2d 599 (11th Cir. 1992).

Review of the record demonstrates that there is no indication of

misappropriation of Dr. Banfield's funds or contributions made to the AAELO Pension Plan. The actuary firm retained by Mrs. Banfield to conduct an evaluation of the distributable benefits from the Plan reported that Dr. Banfield made approximately sixty to sixty-five percent of the contributions and received the same percentage of benefits.

Virginia Bennett, secretary and bookkeeper of AAELO testified that Dr. Banfield and Dr. Turner co-signed all checks issued by the Plan. Neither could remove funds without the others knowledge. She stated that Dr. Banfield and Dr. Turner had an amicable relationship and trusted one another. Throughout her 14 years employment with

AAELO she saw no evidence of fraudulent or inappropriate conduct by Dr. Turner.

A financial consultant reviewed Dr. Banfield's estate and financial files and was unable to find any evidence of fraud with regard to the administration of the Pension Plan.

Accordingly, the motions for summary judgment are granted.

IT IS SO ORDERED.

George W. White
UNITED STATES
DISTRICT JUDGE
5-12-94

APPENDIX C

ORDER DENYING REHEARING

Reprinted below is the Order of the United States Court of Appeals For The Sixth Circuit Court in the appeal Darlene Banfield v. Kenneth W. Turner et al., Record No. 94-3663, 94-3864 filed October 12, 1995, on the appellants' Petition for Rehearing with Suggestion for Rehearing In Banc.

Before: RYAN, BATCHELDER and MOORE, Circuit Judges

Upon consideration of the petition for rehearing filed by the defendant, which was one (1) day late but is, nonetheless, accepted for filing,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

For the Court,
/s/ Leonard Green

CLERK

Dated: Oct 12, 1995

APPENDIX D

Text of Cited Authorities

The limitation on contribution to a pension plan is found in I.R.C. Section 401 (a) and (c) Requirements for Qualification :

" A trust ... forming a part of a ... pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section ... (c) of contributions are made to the trust by such employer, or employees, or both ..." (emphasis ours).

I.R.C. Section 401 et seq.:

"[I.R.C.] Regulations Sect.1.401-0 Scope and Definitions. - (b) Definitions. For purposes of the post-ERISA regulations -

(1) Qualified Plan. The term "qualified plan" means a plan which satisfies the requirements of I.R.C. Section 401(a).

[I.R.C.] Regulations Sect. 1.401-1

Qualified pension ... plans:

(a) Introduction -"(1) [I.R.C.] Sections 401 through 405 relate to pension. . . plans. [I.R.C.] Sect. 401(a) prescribes the requirements which must be met for qualification of a trust forming part of a pension, . . plan."

(2) A qualified pension . . . is a defined written program (emphasis ours) and arrangement which is communicated to the employees and which is established and maintained by an employer. (emphasis ours)

(3) In order for a trust forming part of a pension . . . plan to constitute a qualified trust under [I.R.C.] Section 401(a), the following tests must be met:

(ii) It must be apart of pension plan established by an employer (emphasis ours) for the exclusive benefit of his employees....

(v) It must be part of a plan which benefits prescribed percentages of the employees...(non-discriminatory)

(vi) It must be a part of a plan under which contributions or benefits do not discriminate in favor of certain specified classes of employees (see [I.R.C.] Section 1.401-4)

(b) General Rules. - (1)(i). . . Retirement benefits generally are measured by ... , such factors as years of service and compensation received by the employees.(emphasis ours)

. . .(3). . . A plan is not for the exclusive benefit of employees ... if, by any devise whatever, it discriminates either in eligibility requirements, contributions, or benefits in favor of employees who are officers, shareholders, ..., or highly compensated employees. . . All the surrounding and attendant circumstances and the details of the plan will be indicative of whether it is a bona fide. . . pension . . . plan.

(5)(ii) Where trust funds are . . . loaned to, .. other persons described in [I.R.C.] Section 503(b), full disclosure must be made of the reasons for such arrangements and the conditions under which such investments (emphasis ours) are made in order that a determination [by the I.R.S.] may be made whether the trust serves any purpose other than constituting part of a plan for the exclusive benefit of employees." (emphasis ours)

APPENDIX E

Other Materials

Section E (i)

DEFENDANT KENNETH W. TURNER'S SEPARATE ANSWER TO COMPLAINT OF PLAINTIFF DARLENE BANFIELD:

PAGE 029, PARAGRAPH 16

The Anesthesiology Assoc. of East Liverpool, Ohio, Inc. received monies from Harlow F. Banfield referred to as "Private Practice Income"; however, the Defendant is without information or knowledge sufficient to form a belief as to the dates and amounts of payment, and therefore, denies the same.

PAGE 029, PARAGRAPH 17

The Defendant admits the private practice income transfered and assigned by Harlow F. Banfield to Anesthesiology Assoc. of East Liverpool, Ohio, Inc. was not from the profits of AAELO.

Section E (ii)

Now comes Plaintiff by and through counsel and moves this court for Defendants collectively to produce discovery which was requested on May 18, 1993 and to date has not been provided and for good cause states that this case involving a pension, its funding and distribution therefrom, centers around financial data, particularly the pension checking and savings accounts. The Plaintiff requested discovery of these accounts on May 18, 1993 and to date they have not been received. These accounts

are critical in the proof of Plaintiff's claim as to who funded the pension and Plaintiff's inability to obtain this discovery greatly prejudices Plaintiff in the preparation for and the presentation to the early neutral evaluator.

Now comes Plaintiff by and through their counsel and move this Court for an order to extend time to file her brief in opposition to Motion for Summary Judgment until 14 days after the Defendants give Notice to the Court of filing additional discovery.

Heretofore the Plaintiff requested Defendants to produce certain discovery including but not limited to two (2) pension bank accounts involving

Anesthesiology Association of east Liverpool, Inc. Integrated Pension fund Acct. No. 4-46246 (First National Bank of East Liverpool, Ohio n.k.a Bank One Acct. No. 000446246) and Anesthesiology Association of East Liverpool, Ohio Inc. Pension Trust Acct. No. 4-46254 n.k.a Bank One Acct. No. 000446254.

The Defendants did produce documents from 8/31/78 to 1/22/88 with a 1/22/88 balance of $7,187.65 for the Pension Trust and 9/22/78 to 1/23/90 with a 1/23/90 balance of $2,975.00 for the Integrated Pension Fund.

Information available indicates that the Pension Trust was in existence long after the date for which the discovery

was produced. Attached is the front page of a Form 5500-C/R for the Pension Plan indicating the existence of the Bank One Checking Acct. # 000446254 with a balance of $37,725.62. See Exhibit A.

Information available also indicates that the Pension Plan and/or Integrated Plan was in existence during the calendar year 1991 in which no information has been provided, and Plaintiff believes that the Integrated Pension Fund was in existence in 1991. See Exhibit B.

The discovery not provided from the period of 1/22/88 to final distribution to the issue of whether distributions from the plan were correct. In order to properly respond to the Summary Judgment motion, the obtainment of this

information is compulsory.

Therefore, the Plaintiff respectfully requests this Court to extend the time to respond to the Motion for Summary Judgment until 14 days after the previously requested discovery has been completed.

Section E (iii) Excerpts from Moskal, Jaras Report

BASIC ISSUES

ARE THE DISTRIBUTION CALCULATIONS FOR DR. BANFIELD CORRECT?

ACCORDING TO MRS. BANFIELD, DR. BANFIELD ALSO HAD ANOTHER PRACTICE (sole proprietorship) WITH INCOME BEING TRANSFERRED TO THE CORPORATION FOR THE PURPOSE OF BEING INVESTED IN THE PENSION PLANS. WHAT HAPPENED TO THIS MONEY (approx. $272,000)?

DR. KENNETH W. TURNER (Dr. Banfield's partner) HAS DISTRIBUTIONS DUE FROM THE

PLANS. ARE THESE CALCULATIONS CORRECT?

THERE WERE EMPLOYEES OF THE CORPORATION WHO WERE ALSO PARTICIPATING IN THE PLANS. THEIR DISTRIBUTIONS WERE MADE IN 1988, 1989, and 1990. WERE THE CALCULATIONS CORRECT?

HISTORY OF CONTRIBUTIONS

DATE		H. F. BANFIELD PRIVATE PRACTICE INCOME
06/30/78	INTEGRATED PENSION TOTAL	(not included in contribution)
06/30/79	INTEGRATED PENSION TOTAL	$ 31,746
06/30/80	INTEGRATED PENSION TOTAL	38,182
06/30/81	INTEGRATED PENSION TOTAL	48,645

06/30/82	INTEGRATED PENSION TOTAL	50,315
06/30/83	INTEGRATED PENSION TOTAL	49,247
06/30/84	INTEGRATED PENSION TOTAL	33,900
06/30/85	INTEGRATED PENSION TOTAL	20,349
06/30/86	INTEGRATED PENSION TOTAL	
06/30/87	INTEGRATED PENSION TOTAL	
	TOTAL	$ 272,384

Banfield Private Practice Income	Banfield	Turner	Total
$272,384	$533,338	$327,677	861,015
	62%	38%	100%

[Petitioner's Note that the private practice income is not included in the computation of the allacative actuarial totals

Loss Allocation

	Total	Re-Allocation Due to Asset INsufficiency
Mrs Banfield	1,114,627	($7,688)
Dr. K.W. Turner	369,474	($4,293)

[Petitioners Note--Loss only allocated to the above participants and to no other beneficiaries]

RESULTS OF EVALUATION

DR. BANFIELD DID CONTRIBUTE APPROXIMATELY 60-65% OF THE PLAN CONTRIBUTIONS AND ALSO RECEIVED APPROXIMATELY 60-65% OF THE

BENEFITS. THEREFORE, THE PRIVATE PRACTICE INCOME DID FLOW THROUGH TO THE PENSION PLANS.

ACCORDING TO OUR CALCULATIONS, THE REMAINING DISTRIBUTIONS TO BE MADE @ 12/31/90 ARE:

MRS. D. BANFIELD

Integrated	Pension	(1) Less: RE-ALLOCATION DUE TO ASSET INSUFFICIENCY
$ 435,687	$ 678,940	$ (7,688)
TOTAL DUE		$ 1,106,93

DR. K.W. TURNER

Integrated	Pension	Less: RE-ALLOCATION DUE TO ASSET INSUFFICIENCY

$358,893	$ 10,581	$ (74,293)
	TOTAL DUE	$365,18

Section E (iv)

DEPOSITION OF MARVIN H. FELDMAN

Page 25

15 Q. Who suggested Moskal Jerris?

16 A. I did.

Page 46

2 Q. And was it then your suggestion that in fact none of the

3 $250,000 should have been put in?

4 A. If Fred had come to me and said what should I do, I

5 probably would have said buy a

Keogh for just yourself, don't put any more money in the corporate side.

Q. Doesn't a Keogh have limitation?

A. A Keogh has a limitation, depending upon earnings, yes. Well, there are two different types of Keoghs, though. There is a defined benefit pension Keogh, and then there's a regular Keogh, which is thirty thousand a year max.

Q. So that what you're saying is your advise would have been different than that of what the Thompson Plan is advising?

A. That's correct.

Q. And in the report of Moskal Jerris, did they say that the contribution made then was done improperly?

A. They were not asked to make a determination as to whether it was proper or improper. They were asked to make a determination as to the allocation of funds.

Q. I know. You've said that it was pursuant to the trust document.

A. Right.

Section E (v)

COMPENSATION SYSTEMS, INC.
OF AMERICA

Pension Administrators and Actuaries

26250 Euclid Avenue, Suite 531,
Euclid, Ohio 44132-3602
(216) 731-7701

Feb. 8, 1994

William Paul McGurie, Esq.
MCGUIRE AND FORD CO., L.P.A.

Bank One Bldg.
106 East Market Street, Suite 705
Warren, Ohio 44482

Re: Banfield vs. Turner

Dear Mr. McGuire:

One of the main issues which we are investigating is the source of funding for both the Pension and the Integrated Plans.

Dr. Banfield reached Normal Retirement Age during 1984, therefore no contributions on his behalf were made after that year. All of the contributions which were made out of the private practice into the Pension Plans had to have been made prior to his reaching NRA in 1984.

The **Plan** checkbooks do not indicate the source of the deposits, therefore the **source** records are required to determine which accounts the deposits came from. The only deposit which can be traced to the private practice in the records we have was for $20,000. and it was made in 1984. In order to determine the source of the contributions made to the Plans, we must review the actual checkbooks of the possible sources. At this time we are still missing the following necessary records:

Private Practice of Dr. Banfield:

Checkbook for 1978-1983 (the book we have begins in April, 1983)

AAEL Corp.:

Checkbook for 1978-1983
Savings Acct. for 1978-1984

Exhibit A
Page 1 of 2
Page 2

We will not be able to meet the proposed due date of March 1 without the above records.

Please forward them to our office a your earliest convenience.

Sincerely,

Comensation Systems, Inc. of America

By:_____
Martin A. Jaras, CPA

Section E (vi)
Excerpted from Tax Sheltered Plan Proposal for Anestesiology Associates of E. Liverpool, Ohio P.C. by B.J. Thompson & Associates, Inc. Dated June, 1978

HARLOW F. BANFIELD

ANALYSIS OF VOLUNTARY CONTRIBUTION

ESTIMATED INCOME - $100,000

TAX BRACKET - 62%

RETIREMENT PLAN ENTRY AGE - 63

MAXIMUM VOLUNTARY CONTRIBUTION - 10% OF Salary

ALTERNATIVE
INVESTMENT

	METHODS	
	Personal	Voluntary Contribution
AVAILABLE INVESTMENT:	$10,000	$10,000
INVESTMENT RESULTS:		
Gross Earnings On Investments	8%	8%
Less: Income Tax Payable	5%	-0-
Earnings Remaining After Taxes	3%	8%

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
Accumulation Results:		
7 Year Total (after taxes)	$76,624	$83,652
Difference:		

$ 7,028

NOTE: PLAN ADMINISTRATOR WAS AWARE OF METHODS WHICH WOULD EARMARK BENEFIT TO DR. BANFIELD.

KENNETH W. TURNER

ANALYSIS OF VOLUNTARY CONTRIBUTION

ESTIMATED INCOME - $72,000

TAX BRACKET - 55%

RETIREMENT PLAN ENTRY AGE - 55

MAXIMUM VOLUNTARY CONTRIBUTION - 10% OF SALARY

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
AVAILABLE INVESTMENT:	$7,200	$7,200
INVESTMENT RESULTS:		
Gross Earnings On Investments	8%	8%
Less: Income Tax Payable	4.4%	-0-

	ALTERNATIVE INVESTMENT METHODS	
	Personal	Voluntary Contribution
Earnings Remaining After Taxes	3.6%	8%
Accumulation Results:		

7 Year Total (after taxes)	$84,956	$93,320
Difference:		
	$ 8,364	

RECOMMENDATION:

Have salary from partnership run through corporation to increase wages and deposit:

PARTNERSHIP SALARY	$40,000
CORPORATE INCOME	$80,000
TOTAL INCOME	$120,000

[Petitioners's Note -- The assignment of income was contemplated at the very first proposal of the plan]

Section E (vii)

Excerted from Dr. Banfield's 1976

Form 1040

Form 1040

Income other than Wages, Dividends and Interest.

29 Business income 76,843.51

32a Pensions, annuities, rents, royalties, partnerships, estates or trusts, etc. 20,776.95

Section E (viii)

DEPOSITION OF WILLIAM MILLER

Page 11

Lines 6-11

Q. Were you a participant in any meeting that occurred between Dr. Banfield and Dr. Turner and Mr. Gallagher with regard to --

A. The initial meeting they had, I was there.

Q. And when was that initial

meeting?

A. I would say it would be in 1977 sometime.

DEPOSITION OF WILLIAM MILLER

Page 12

Lines 23-25

A. He was a partner in a practice with his brother, and, I believe, his brother's son-in-law, which is Banfield, Banfield & Amato.

Page 13

Lines 12-19

Q. Were you aware that as a part of the discussion prior to the inception of the plan that they were discussing to take Dr. Banfield's income, private practice income, and put it into the AAELO corporation checking account and then transfer that fund to AAELO's pension account?

A. My understanding was Dr. Banfield would assign his private practice income to the corporation, AAELO;

Page 14

Lines 7-10

Q. At any time in the past, have you ever classified the transfer of funds from Dr. Banfield's private practice to the corporation as a gift?

A. No.

Page 15

Lines 1-7

Q. Were you aware that the 5500s for these plans were being prepared by Thompson Plan --

A. Yes, I was.

Q. -- or its successor in interest, B. J. Thompson & Associates, Inc.?

A Thompson Plan

Administration was preparing
the 5500s.

Page 16

Lines 24-25

Q. Okay. Prior to 1977, did you report Dr. Banfield's private practice income on his 1040?

Page 17

Lines 1-10

A. Prior to the assignment of the income to the corporation, the private practice income would have been reported on his 1040, yes.

Q. And after the assignment

of income, did
you report that income on his
1040?
A. Not on his 1040, no.
Q And for how long did that
occur; until Dr.
Banfield passed away?
A. No. He withdrew his
assignment, I
believe, in '85 sometime; and I
think his private practice
income remained -- did not go to
the corporation.

Page 19

Lines 3-22

Q. Okay. Irregardless of
what date they

actually moved into that building, did they maintain separate physical offices in that building?

A. Yes, they did.

Q. When you walked through the door, if you went to the left, you would go to a room marked AAELO?

A. That's correct.

Q And if you walked to the right, you go into another room that was marked Dr. Banfield?

A. That's correct.

Q. What type of practice did Dr. Banfield perform in his private practice?

A. General practice.

Q. Did he perform pediatrics?

A. Yes.

Q. How about AAELO?

A. Anesthesiology administration.

Q. Were there any doors that connected those two offices other than the two entrance doors?

A. Not that I -- no.

Page 21

Lines 13-19

Q. Does that document reflect how much private practice money was transferred to AAELO?

A. No, it does not.

Q. In what way is it in error?

A. In what way what?

Q. In what way does it not describe it?

A. I'm sorry. It does, yes.

Page 24

Line 21

Q. Were you present at a meeting between

Page 25

Line 1

A. Was that the one in my office?

Page 27

Lines 10-14

A. At the time he assigned the income to the corporation, it was not reported on his 1040.

Q. And he did not pay tax on that income on a 1040 basis?

A. That's correct.

Page 33

Lines 15-25

Q. In the initial discussion with regard to the establishment of these pension plans, were you privy to any discussion as to whether AAELO

Corporation would have a
18 cash flow problem meeting its
obligations if the pension
19 plans were put in place?
20 A. Well, if the two pension
plans were put in
21 place and Dr. Banfield had not
designated his income to the
22 corporation, there would have been
-- and drew the same
23 amount of salary out, there would
have been no way the
24 corporation could have funded the
pension as it was funded.
25 Q. So the only way to fund
these pension

Page 34

Lines 1-5

plans was to transfer the money from Dr. Banfield to the corporation?

A. That was the idea of the second pension plan was to give him availability of another plan to shelter his private practice.

Section E (ix)

PLAINTIFFS MEMORANDUM IN OPPOSITION
TO MOTIONS FOR SUMMARY JUDGMENT

ORAL HEARING REQUESTED

Now comes Plaintiff by and through her counsel and submits the memorandum in opposition to Motion for Summary Judgment and states that for purposes of efficiency it will file one brief in response to all motions for Summary Judgment as the motions of Defendants Miller, Visnic, Crable, and Miller, and Thompson are substantive issues and the

motion of Turner is interrelated to the discussion in response to Defendant Miller and Thompsons's.

The gist of the motions of Defendant's Miller; Crable; Crable, Visnic & Miller and Thompson asset that (1) they are not fiduciaries under ERISA and therefore are not proper parties before this Court and (2) the cause as asserted by Plaintiff are state causes of action which ERISA does not pre-empt.

FACTS

Mr. Gallagher graduated from Cleveland State University Law School in 1975 (Tr P7, L2); practicing lawyer (TR. P7, L11, L23); former IRS agent reviewing pension and profit sharing plan (TR. P13, L12-16); student federal income tax

course in law school (TR. P23, L14) and attended extensive seminars in the field of pensions (TR. P24, L6-24); offering legal advise with regard to pension plans (TR. P8, L7-16) work with both plan administration company as president and insurance sales company (TR. P8, L7-9)

Thompson Plan Administration Company does full service pension work. It designs, implements, administers and terminates plan (TR., P11, L9-12) calculating contributions, accounting balances, filling out 5500 Forms (TR. P11, L7-11) person's business who's involved in the formulation of the plan rely upon Thompson Plan Administrator expertise as a plan administrator and manager and as an attorney (TR., P12, L5-

9)

At the time of plan inception B.J. Thompson acted as both insurance sales and qualified plan administrator (TR. P14, L4-6)

The plan in question structured by B.J. Thompson Plan Administrators (TR., P16, L5) The plan administrator performed the services described in the invoices (EXHIBIT 4 and Tr. P20, L6-19) submitted to the plan.

The plan was structured with the knowledge that the employer had insufficient funds to meet its pension cost obligation (TR. P22, L25 - P23, L13)

The client gives the plan their goals and plan administrator create a plan that meets the goals (TR., P20, L22,

P21, L2). Knowing that the establishment of the plan would create a cash flow problem, the plan wa designed to transfer funds from a separate taxable entity (not the plans sponsor) to the plan (TR. p25 L7-P26, L7) (See Plaintiff's Exhibit 1 Page 7)

The Defendant Thompson could not support his preposition that Dr. Banfield was a leased employee of AAELO to Dr. Banfield's private practice (TR. P31, L4-10) (TR. P31 L15 to P32 L8). The Defendant Thompson prepared the proposal (Plaintiff's exhibit 1) and completed the documents necessary to establish the plan (TR. P31 L12-15) Provided Summary Plan Description (TR. P32 L22) [sic real estate plan descriptions]; benefit

statements for each plan year (TR P33, L3-4).

Further, the Defendant Thompson acknowledges that the plans are established for the benefit of the participants of the plan (TR. P33, L8-25) and Defendant Thompson was paid for the establishment of the plan (TR. P36, L19-21) and made later changes for the plan year (TR. P33, L3-4).

The Defendant Thompson indicated that the amount of funds transferred was provided by Defendant Miller (TR P34, L10) Further the purpose to transfer the funds from Dr. Banfield's private practice was to shelter that income from Federal Income Tax (TR. P39, L18, - P40, L3)

Defendant Thompson acknowledge that he calculated the amount of the plan benefit (TR P43, L6, - P44, L10) and that he denied the fact that the plan was underfunded and Mrs. Banfield did not reduce her plan benefit by an alleged $25,000 of underfunding.

Defendant Thompson stated that its company "administrators (the) qualified plans for AAELO" TR. P44 L15 but was not the "plan administrators TR. P44, L25.

Defendant Thompson Plan admits that duties were delegated to Thompson Plan (TR. P45, L9) including the preparation of Form 5500 where loans to participants (i.e. Dr. Turner) were not disclosed. (TR. P46 L1-12)

Defendant Thompson Plan admits that

a company that it shares space with B.J. Thompson sold an annuity to the plan (TR. P46, L18-19) and that clients of both the Thompson Plan Administrators and B.J. Thompson and associates (TR. P50, L8-9) and that upon sales of insurance products by B.J. Thompson and Executive Life Annuity and a life policy on Dr. Banfield (TR. P53, L15) and obtained a commission on the sale of that product (TR P54, L1-4).

Defendant Thompson Plan admits that despite the assertion that the private practice income being for the sole benefit of Dr. Banfield, that Dr. Turner since the plan was a defined benefit plan, that plan contributions benefit all the beneficiaries of the plan (TR. P55,

L4 to 25); (TR. P56 L1-4); (TR P65 L23-25) that no separate accounts were established for a participant (TR. P62, L16-18) and Dr. Banfield made no separate vso contributions (TR. P64, L8-12) and such vso contributions would have been separatley segregated (TR. P64 L13-25). Defendant Thompson admits that Mr. Miller was aware that Dr. Banfield's private practice income would be transferred to the plan (TR P58 L4-8).

Defendant Thompson admits that without Dr. Banfield's private practice income the plan benefits would have been reduced for the plan participants (TR P66, L1-7)

Defendant Thompson admits that the figures for salary, bonus and plan

contributions were provided by Bill Miller and the contribution amounts were computed by Defendant Thompson (TR.P66, L16-25) and Dr. Turner did not make the determination of contribution (TR. P67, L18-25) Thompson plan made the determinatin for plan benefits (TR. P69, L2-9).

Defendant Thompson stated that AAELO would not have the financial resources to fund the plan and maintain the same levels of compensation to Dr. Turner and Dr. Banfield, and fully fund the plans (TR P75, L12-19) and that Dr. Banfields and Dr. Turners compensation was not substantially different prior to the instructions of the plans (TR P77, L11-15)

Further Defendant Thompson stated that if an error was made in the payment of a plan participant that the plan administrator would have the ability to seek restitution from the plan participant who is overpaid (TR. P88, L1-6)

Banfield Private Practice Employees:

Roberta Helfrich	TR P5 L7
Darlene Banfield	TR P5 L17-18
Marcia Welsh	TR P6 L8-10

Employees of AAELO

Rosie Gabbert	TR P8 L3
Margaret Misconish	TR P13 L24
Margaret Alberti	TR P14 L17
Ann Smith	TR P15 L1
Mary Smurthwaite	TR P15 L18

Betty Barnhart TR P15 L25

Received check form Dr. Banfield to be deposited in AAELO (TR P8 L12-14 and TR P9 L18-24) and which it was turned over to the pension fund (TR P9, L1-3)

Private practice employees did not receive a W-2 from AAELO (TR. P12, L16-17)

Virginia Bennet in her deposition stated tht she was instructed to write checks off the pension account by Bill Miller (TR. P18, L3-11) or Mr. Thompson (TR P62 L15-19) and that Mr. Miller handled the pension loan paybacks (TR. P74, L14-17) and that the doctors did not have a working knowledge of the plan when asked questions and required Defendant Thompson to explain the plan (TR. P29,

L14-18). Her opinion was that Dr. Turner did not know anything about the plan (TR. P34, L2-3).

Dr. Turner never provided similar checks to place in pension fund as Dr. Banfield did (TR. P73, L21-24). A natural question of fact arises sice Mrs. Bennett's testimony indicates loan repayments were for corporated loan repayments not pension loan repayments (TR. P76, L1-25 and TR. P77 L1-2) and that no pension loan repayment were ever made.

Denise (Darlene Banfield's sister TR P6 L7

Roberta Helfrich TR P5 L22
(Gabbert 8 yrs. left 1983 TR P37 L7)

Dr. Turner never deposited check into

AAELO (TR P12 L15-16) Repayments for Corporate Loans (TR P14 L12-20 and P15 L1-14) Salary checks of Dr. Turner and Banfield in like amounts - (TR P14 L22-24)

Confirmed that Mr. Miller was familiar with the separate offices of AAELO and Dr. Banfield (TR P19 L17 and TR P23 L22) the offices were totally separate.

Pediatric practice was part-time (TR P24 L15-19), private practice separately listed in phone book (TR P25 L15-18).

Private practice not in AAELO portion of the building (TR P27 L12-20). Private practice had separate staff (TR P36 L4-8)

Checks deposited to AAELO after they

were redeposited were taken care of by Mr. Miller (TR P43 L13-15).

At Deposition (TR P45 L14-21) Rose Gabbert that Dr. Banfield had a private practice during the period of time her worked for AAELO (TR P48 L10-13), that the intent was to help his family because Dr. Banfield knew that he would not live long (TR P55 L21-22).

In pertinent part Defendant Miller's Testimony is summarized as follows:

Defendant Miller testified that Defendant Thompson plan did the administrative work for the plans [TR. P10 L16-17]

Defendant Miller was the secretary of AAELO in 1989 upon dissolution of the corporation [TR. P11 L16]

Defendant Miller confirms that prior to the establishment of the plans that he and Defendant Thompson knew that private practice income would be diverted to the plans [TR P12 L5 - P13 L 22]. However Defendant Miller classifies the diversion as an assignment of income in 9 different times in his testimony [TR P13 L19]; [TR P17 LI, L4, L9] [TR P26 Lines 3,4,6,9] [TR P27 LIO] Twice Defendant Miller denied that he ever attempted to explain the diversion of the income as a gift. [TR P147-10] [TR P24 L7-13]

Defendant Miller prepared the Banfield's Form 1040 [TR P14 L22 to 25] Defendant Thompson prepared the pension plan form 5500 [TR P15 1-13] and did the accounting work for the plan [TR. P27, L

18-19] and provided the amount of the deductions for the Corporation 1120 [TR P30 L23] and were paid for their services in the plan [TR P16 L13].

Defendant Miller stated that another accountant did the payroll between 1977 and 1985.

Defendant Miller stated that Dr. Banfield's private practice and AAELO had physically segregated offices [TR P19 L22].

Defendant Miller acknowledges in Plaintiff's Exhibit 8 the amount of contributions given from Dr. Banfield's private practice to the pension plan total [TR P20 L21 to Tr P22 L21]. A review of the Exhibit 8 indicates that Dr. Banfield's private practice income to

the plan exceeded the contribution for the integrated plan.....Further Defendant Miller indicated that he did not recall

Section E (x)

Now comes Darlene Banfield, Appellant, Counsel to submit to this Honorable Court this Petition for rehearing of the above cause on all issues presented for review and in support, respectfully show;

1) On September 12, 1995, this Court rendered its decision in favor of Appellees Kenneth W. Turner, et al., and against Appellants Darlene Banfield, Executrix; etc... et al., affirming

the judgment of the District Court.

2) Appellant seeks a rehearing on the following grounds:

The Appellant believes that the decision of this Court of Appeals has overlooked the application and failed to apply nearly all the applicable substantive tax and pension law set forth in Appellants Brief including but not limited to: Lucas v. Earl, 281 U.S. 111, 74 L.Ed. 731 (1930); United States v. Basye 93 S.Ct. 1080, 410 U.S. 441, 35 L.Ed 2d 412 (1973); Pleason v. Comr. 226 F.2d 732 (7th Cir 1955); Hogle v Comr, 132 F.2d 66 (10th Cir 1942); P.R. Farms, Inc. v. Comr, T.C. Memo 1984-549 affd 820 F.2d 1084 (9th Cir 1987);

Professional & Executive Leasing, Inc. v C.I.R., (1987) 89 TC 225, affd (9th Cir 1988) 862 F.2d 751; Peckman v Board of Trustees, 653 F.2d 424 (10th Cir 1981); Chase v. Trustees of W. Con. of T. Pension T.F., 753 F.2d 744 (9th Cir 1985); Giordano v. Jones, 867 F.2d 409 (7th Cir. 1983)i Kwatcher v. Mass. Service Emp. Pension Fund 879 P.2d 957 (1st Cir 1989); Jamail, Inc. v. Carpenters District Council of Houston Pension & Welfare Trust, 954 F.2d 299 (5th Cir. 1992); Wells v. U.S. Steel & Carnegie Pension Funds, Inc., 950 F.2d 1244 (6th Cir. 1991). Further, The Appellant ask for a review of all cited Internal Revenue Code provisions and regulation previously cited in the

Appellants-brief including but not limited to I.R.C. Section 400 et seq., which includes provisions as to leased employees, definition of employer, employees, contributions, qualification for a qualified plan, and other pertinent provisions.

The opinion of this Court held that Appellant failed to produce evidence which rose to the level of creating a genuine issue of material fact and that Appellee's were entitled to judgment as a matter of law.

The first paragraph on page 2 of this court opinion, the facts stated were "...Dr...Banfield...owned half of an incorporated medical practice called...AAELO. Defendant Turner owned

the other half of AAELO. Dr. Banfield had a separate private medical practice."

Continuing in that same paragraph, the Court held "...Dr. Banfield apparently contributed income from his separate private practice into the AAELO fund" (i.e. two defined benefit pension plans)- The Court supports its own findings by stating at the top of page 3, The Moskal Report also found that "the private practice income did flow through tho the pension plans..."

It is the funding mechanism of the pension plan that is the negative, (i.e. the Appellant failed to produce evidence to created a genuine issue of material fact.) The Appellant states that opinion

failed to discuss whether the funding mechanism was proper under law; the factual basis for the funding mechanism lease employee vs. assigned income; and as the fiduciaries knew of the mechanism (actually suggested that the plan take on the structure (i.e. permit the Court found "Dr. Banfield...(to) contribute income from his separate private practice)), was this funding-structure so flawed as Appellant contents, to raise the level of a breach of fiduciary duty to enhance the benefits of Dr. Banfield if he was the source of the pension contributions (albeit as Appellant argues improper contributions to the AAELO plan).

This Court opinion fails to discuss these material and Appellant believes dispositive issues. Please tell Mrs. Banfield,

Section E (xi)

Excerped from Gallagher Deposition

2/07/94

Citation in text of writ are verbatum cites not duplicated here

18 Q: What was your basis or reason that
19 you recommended that Dr. Banfield's private practice
20 income be placed in AAELO?
21 A: Our recommendation was based on the fact that would give Dr. Banfield the ability to tax shelter more dollars . . .

Page 40

1 Q: When you say tax shelter, what type of tax?

3 A: income tax.

4 Q: This would be 1040 taxes...

6 A: Salary, wages, whatever; right.

Page 55

22 Q: When I make a contribution to a plan on a defined benefit plan, doesn't the plan contributions benefit all the beneficiaies of the plan?

25 A: yes

Page 57

12 Q: How would you deal with an underfunding situation? You' re saying a corporation would make up the underfunding?

15 A : Yes

Page 62

16 Q: In a defined benefit plan, is a seperate plan participant's account established for the participant?

18 A: No

Page 64

8 Q: In this case, was Dr. Banfield's contribution what's commonly called a VSO voluntary savings option.

11 A: Dr. Banfield did not make any contributions.

19 Q: If a voluntary savings option is made as a part of the plan, would the VSO be segregated to the plan participants?

23 A: It wouldn't necessarily be segregated physically, but in a seperate accounting would be kept...

Page 65

13 Q: was a seperate participant's account established for Dr. Banfield?

16 A: The monies received by the corporation were treated as just receipts..."

Section E (xii)

Herr Affidavit

Par 9 In my opinion, the following errors were made in the establishment and administration of the two pension plans sponsored by AAELO.. . . The necessary documents should have been drawn up [for the leased emplyee] and put in place. I hold Mr. Gallagher, his firm, and/or B.J Thompson & Associates, Inc primarily responsible, and William Miller and/or his firm secondarily responcible, for allowing this error to take place.

(i) There were cleaner and simplir stratigies available to accomplish the

goal of utilizing Dr. Banfield's private practice income in the providing of retirement benefits soley to him ... and to the extent that these avenues were not explored nor proposed is an error on the part of the aformentioned parties.

h. I reviewed the "Confidential Report" prepared by the firm of Moskal Jaras dated January 1991. The report makes two important conclusion: that the benefit and distribution clculation made by Gallagher... were reasonably correct; and that Dr. Banfield's contributions into the two plans matched the benefits that he received from the two plans. That last point, however, is regrettably inaccurate. Page 14 of the Confidential Report details all the contributions made

into the plans. Note that none of Dr. Banfield's additional contributions(sourced from his private practice income) representing 24% of the total contributions, yet he received 0% back in benefits. T have designed a retirement program yielding this type of result is additional evidence of the error committed by Gallagher, his firm or B.J. [Thompson & Associates].

i. One other comment regarding the Confidential Report discussed above in subparagraph h. In the calculation of Dr. Turner's retirement benefits, the Report details tht his five year average compensation is based on years 1986 through 1990. The record indicated that AAELO was dissolved... December 31, 1988.

The record further indicates that the new partnership of Dr. Turner and Dr. Dubin did not take over the plan sponsorship of the AAELO plans. Therefore, if Dr. Turner was no longer earning compensation from AAELO, how could his retirement benefits be based upon compensation in 1989 and 1990...

I hold Miller and/or his firm primarily responsible for this error... Gallagher and his firm secondarily responsible.

Section E (xiii)

AFFIDAVIT OF MARTIN JARAS

I, Martin A. Jaras, having been duly sworn state as follows:

1. I, Martin A. Jaras, CPA am over the age of 18 years old, and a citizen of the United States.

2.. I have been retained, in my capacity as Senior Consultant with the administration and actuarial firm of Compensation Systems, Inc. of America, by

Darlene Banfield, Executrix of the estate of Harlow Banfield, to review the establishment and funding of two (2) qualified Pension Plans of Anesthesia Associates of East Liverpool, Ohio, Inc. (AAELO), which Plans are the subject matter of Case No. 4:92 CV 02566 filed in the U.S. Federal District Court.

3. I had previously given a report in my capacity as employee of Moskal Jaras Klein (administrators & actuaries). The report was titled "Evaluation of Distributable Benefits from Defined Pension Plans of Anesthesiology Associates of East Liverpool, Ohio, Inc.", and dated January, 1991,

4. After reviewing the additional records provided by Darlene Banfield and Attorney William McGuire, it is my opinion tht Dr. Banfield assign his income from his private practice to the AAELO Corporation in order to provide additional liquid funds to make required Pension Plan contributions.

A) I do not think this assignment of income was proper and it should have been reported to the IRS on a form Schedule C as an attachment to Dr. Banfield's personal 1040 tax returns. Dr. Banfield maintained a separate business checking account for his private practice, and should have reported the profits and losses of this entity.

B) The private practice of Dr.

Banfield could have adopted, as co-sponsor, the AAELO Pension Plan in order to make contributions and earn benefits pursuant to the Plan provisions and thereby avoided the assignment of income situation.

5. The Defined Benefit type of pension plan provides benefits based on historical earnings of the Plan participants. The benefits are not related to who or what entity contributes funds to the Plan. Accordingly, Dr. Banfield gained no benefit from diverting his private practice income though AAELO and subsequently into the Pension Plans. He would have received the same ultimate benefit if he never made any contributions from his private practice.

A) According to the January, 1991 "Evaluation Report" page 14, Dr. Banfield had private practice income of $272,384 form 1979 to 1985. Apparently this was assigned to the Corporation.

B) If Dr. Banfield or AAELO maintained a Defined Contribution Plan (ie: Profit Sharing, Money Purchase or Target Benefit) additional contributions made from Dr. Banfield's assigned income would have increased his account balance and ultimate benefits.

6. In reviewing Judge White's Summary Judgment Decision, I find that the private practice income of approximately $272,384 contributed by Dr. Banfield is not included in the 62% figure. If it were, Dr. Banfield would have contributed

much more that 62% and still received only 62% of the Plan benefits.

7. There were five (5) separate loans from the Pension Plans to Dr. K.W. Turner. There is evidence that loan repayments were made, and the outstanding balances due at the time of termination of the Plans were treated as a portion of Turner's final distribution (ie: an offset tot his actuarially determined benefit).

A) A review of the loan transaction indicates that Turner's loan balances should have been $3,875 greater at the time of distribution. Therefore, he received $3,875 too much in the cash portion of the distribution. (See

Attached Exhibit A)

8. Further affiant sayeth naught.

STATE OF OHIO)
)SS
COUNTY OF CUYAHOGA)

Martin A. Jaris

Before me, a Notary Public in and for said County and State, personally appeared Martin A. Jaras, who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my Notarial Seal at Euclid, Ohio this 19 day of August, 1994.

Notary Public

AFFIDAVIT OF DARLENE BANFIELD

I Darlene Banfield, having been duly sworn states as follows:

1. I, Darlene Banfield, am over the age of 18 years old and a citizen of the United States.

2. The affiant was the wife of Harlow F. Banfield from August 28, 1971 to the date of death of Harlow F. Banfield on February 17, 1989.

3. The affiant states that Dr. Harlow F. Banfield did not trust Dr. Turner and that their relationship was not amicable. Affiant also believes Rose Gabbert's deposition supports the allegations that Rose Gabbert knew Dr. Banfield was concerned about money matters.

4. Affiant states that the attached Bank records of Crestar Bank N.K.A. Bank One indicate that the AAELO Pension checking account had a balance of $2,975 on December 21, 1989 and Intergrated Plan had a balance of $7,262.68 on December 21, 1987 and that to her knowledge she has received no benefit therefrom and the person or persons to whom it was distributed are unknown. Futher, based

upon informtion and belief, affiant states those accounts (i.e. Misters Turner, Gallagher, or Miller) distributed beneficiaries or estate. Further affiant has requested numerous times from Kenneth W. Turner; William Miller, and Crable, Visnic and Miller, and B.J. Thompson and Associates, Defendants herein, to provide an accounting of such pension plan accounts and AAELO, Inc. corporate accounts and that none of said defendants has provided such information and have failed and refused to provide such information after repeated requests. Affiant also attaches copies of checks of pension and integrated plan attached hereto and be made a part hereof.

5. That at the time of establishing the Integrated Pension Plan, Mr. Gallagher and Mr. Turner, defendants herein, indicted and represented to Dr. Banfield though his private practice contributions to such plan, he would be receiving a "bigger piece of the pie" when in fact as now known by the affiant, Dr. Banfield was contributing to a defined benefit pension plan which would calculate the same benefits payable to Dr. Banfield irregardless of whether Dr. Banfield contributed his private practice income to such plan.

95-1094

No.

Supreme Court, U.S.
FILED
JAN 16 1996
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

DARLENE BANFIELD, Executrix of the Estate of Harlow F. Banfield, et al.,
Petitioners,

v.

KENNETH W. TURNER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF FRANCIS P. GALLAGHER AND THOMSON PLAN ADMINISTRATION COMPANY TO PETITION FOR A WRIT OF CERTIORARI

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8 pp

QUESTIONS PRESENTED FOR REVIEW

Is summary judgment appropriate when the petitioners have failed to present any evidence that any fraud, breach of contract or misappropriation was caused by the respondents?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE BANFIELD,Executrix of the Estate
of Harlow F. Banfield, et al,
Petitioners,

v.

KENNETH W. TURNER, et al.,
Respondents.

The petitioners brought a cause of action against Francis P. Gallagher and Thompson Plan Administration Company and thereafter Francis P. Gallagher and Thompson Plan Administration Company moved for summary judgment. The Trial Court held although there was a question of fact as to whether Francis P. Gallagher or Thompson Plan Administration Company was a fiduciary, the plaintiff failed to present any evidence controverting Gallagher and Thompson Plan Administration's assertion that they did not direct, act or conspire with regard to the acts complained of in the Complaint. [J.A.32]

Thereafter, the petitioner appealed the Trial Court's ruling to the Sixth Circuit Court of Appeals which resulted in a *de novo* review by the Court. [J.A.8] The

Court of Appeals found that the District Court was correct that Mrs. Banfield had not shown a genuine issue of material fact on the allegations of breach of fiduciary duty. The Court further found that the defendants supported their summary judgment motions with affidavits and deposition testimony. Finally, the Court found that Mrs. Banfield presented no evidence that any fraud, breach of contract or misappropriation occurred. [J.A.11 and 12]

SUMMARY OF ARGUMENT

The petitioners have not presented any special and important reasons for this Court to review the granting of summary judgment on the decision of the Trial Court. The petitioners have not shown that the decision of the Court of Appeals is in conflict with the decision of another United States Court of Appeals, or that the decision by the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

ARGUMENT

The Petition for Writ of Certiorari filed by the petitioners fails to demonstrate any special or important reason why this Court should grant the within Petition for Writ of Certiorari. The petitioners have not demonstrated that this decision by the Sixth Circuit Court of Appeals in any way is in conflict with the decision of another United States Court of Appeals on the same matter. The petitioner makes reference to the decision in ***Martuccio v. Comm.*** (1994 CA 6), 1994 UAPP Lexis 19204. However, a review of the within decision will

indicate that the decision of the Sixth Circuit Court of Appeals is not in conflict with the within decision and does not have any application to the issues raised in this case.

The respondents, Francis P. Gallagher and Thompson Plan Administration Company, properly filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and supported said Motion with the affidavit of Francis P. Gallagher. The petitioners failed to place before the Court any evidence that there was fraud, breach of contract or misappropriation. All the petitioners are attempting to do is again request a reviewing Court to review the appropriateness of having the Trial Court grant summary judgment in favor of the respondents, Francis P. Gallagher and Thompson Plan Administration Company. This review was thoroughly conducted by the Court of Appeals. The petitioners have failed to demonstrate any special or important reason for this Court to grant the within Petition for Writ of Certiorari.

CONCLUSION

The petitioners have failed to demonstrate any reason as to why this Court should grant the Petition for Writ of Certiorari when summary judgment was properly granted in favor of the respondents, Francis P. Gallagher and Thompson Plan Administration Company.

Francis P. Gallagher and Thompson Plan Administration Company

By: /s/ John C. Cubar
Counsel of Record

Date: 01/10/96
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(3)

Supreme Court, U.S.
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No. 95-1094

In the Supreme Court of the United States

October Term, 1995

Darlene Banfield, Executrix
of the Estate of Harlow F. Banfield, et al.,
Petitioners,

vs.

Kenneth W. Turner, M.D., et al.,
Respondents.

BRIEF OF KENNETH W. TURNER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the District Court properly granted, and the Court of Appeals affirmed, Respondent, Dr. Kenneth W. Turner's Motion for Summary Judgment when the Petitioners did not prove essential elements of their case, wherein the Record demonstrates Dr. Turner acted legally, appropriately and fairly in the administration of the plan and the distribution of plan benefits, and not in an arbitrary, capricious or fraudulent manner.

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No. 95-1094

In the Supreme Court of the United States

October Term, 1995

Darlene Banfield, Executrix
of the Estate of Harlow F. Banfield, et al.,
Petitioners,

v.

Kenneth W. Turner, M.D., et al.,
Respondents.

BRIEF OF RESPONDENT, KENNETH W. TURNER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The United States District Court, Northern District of Ohio, Eastern Division, granted the Respondent, Kenneth W. Turner's Motion for Summary Judgment and found in its Memorandum and Order that although Kenneth Turner, M.D. was a Fiduciary of the Plan there was no indication he acted inappropriately or that any of Dr. Banfield's funds or contributions made to the AAELO Pension

Plan were misappropriated. The District Court, upon its review of the record, found evidence that Dr. Banfield made approximately 60 to 65% of the contributions and received the same percentage of benefits. The District Court, inter alia, relied upon the deposition testimony of Virginia Bennett, the secretary and bookkeeper of AAELO. Miss Bennett testified Dr. Banfield and Dr. Turner co-signed all checks issued by the Plan; neither could remove funds without the other's knowledge; and the doctors had an amicable relationship and trust in one another. Furthermore, throughout her 14 years of employment with AAELO, Miss Bennett testified she did not see any evidence of fraudulent or inappropriate conduct by Dr. Turner. The District Court also considered the report of a financial consultant hired by Dr. Banfield's Estate, who reviewed Dr. Banfield's Estate and financial files and was unable to find any evidence of fraud with regard to the administration of the pension plan. (R 56, p. 5)

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's Order after reviewing the matter de novo. The Court of Appeals recognized a fiduciary's decisions will be upheld under ERISA unless they are arbitrary or capricious. The Appellate Court found neither party had disputed Dr. Turner had discretionary authority and found Petitioners, herein, had not put forward any evidence to create a genuine issue of material fact regarding whether any of Dr. Turner's decisions were arbitrary or capricious. The Appellate Court further found Mrs. Banfield did not put forward any evidence of a fraud, misappropriation, or breach of contract by another fiduciary which Dr. Turner knowingly failed to stop.

The Appellate Court concluded the Petitioners had not carried their burden of coming forward with sufficient evidence to create a dispute of material fact and that Summary Judgment was correctly entered against them. (Appx. A, pp. 13-16)

ARGUMENT

The Respondent, Kenneth W. Turner, respectfully requests this Court deny the Petition for Writ of Certiorari because the Petitioner has not demonstrated compelling reasons for granting the Petition as required by Supreme Court Rule 10. In accordance with Rule 10, a Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Petitioners are alleging these exact errors as a basis for their Petition for Writ of Certiorari.

The District Court properly granted Summary Judgment to the Respondent, Kenneth W. Turner, in accordance with the provisions of Federal Rule of Civil Procedure 56. Rule 56(c) mandates the entry of a Summary Judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material facts as a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Cellotex v. Catrett* (1986), 477 U.S. 317; *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986), 475 U.S. 574.

In *Ershick v. United Missouri Bank, N.A.* (1991, 10th Cir.), 948 F. 2d 660, the Court of Appeals held, under ERISA, the decisions of a fiduciary will be upheld unless they are arbitrary and capricious and are not supported by substantial evidence, or are erroneous on questions of law. (see, also *Pokratz v. Jones Dairy Farm* (1985, 7th Cir), 771 F.2d 206. In cases involving discretionary plans, courts should not abandon the arbitrary and capricious standard nor create a separate abuse of discretion standard but instead the two terms should be used interchangeably. *Daniels v. Anchor Hocking Corp.* (1991), 758 F. Supp. 326. In *Tiemeyer v. Community Mut. Ins. Co.* (1992, S.D. Ohio), 789 F. Supp. 894, the District Court held where a fiduciary has a clear grant of discretionary authority, the arbitrary and capricious standard of review applies to his determinations.

McDaniel v. Blue Cross and Blue Shield of Alabama (1992), 780 F. Supp. 1363, aff'd, (1992, 11th Cir.) 977 F. 2d 599, held if the plain language of a plan gives the plan fiduciary discretionary authority to determine the eligibility for benefits or to construe the terms of the plan, then a court will review such determinations under the arbitrary and capricious standard, and under this standard, a fiduciary's decision is to be upheld unless the complaining party proves the decision is not reasonable or rationally based on facts.

Petitioners have not produced any evidence to show a misappropriation of Dr. Banfield's funds, monies or contributions to the AAELO Pension Plans. The report of the actuarial firm retained by Petitioners indicated Dr. Banfield's private practice income which he contributed to the plans flowed

through the plans to his benefit. Respondent, Dr. Turner, did not misappropriate the funds of the plans or defraud Dr. Banfield of any contributions or benefits due and owing to him.

Petitioners failed to meet their burden on essential elements of their case as they did not show Dr. Turner acted arbitrarily or capriciously in his discretionary capacity; nor were they able to prove decisions made by Dr. Turner were not reasonable or rational based upon the facts.

Respondent, Dr. Turner, believes other issues raised by Petitioners in their appeal do not relate to him, and therefore, his response thereto is not necessary.

CONCLUSION

The Respondent, Kenneth W. Turner, states the Petitioners have not demonstrated any basis for review by this Court in accordance with Supreme Court Rule 10. Petitioners have not asserted any errors on the part of the Court of Appeals as to the Respondent, Dr. Turner, to cause this Court to grant their Petition; nor, have Petitioners presented any other compelling reasons for review. This Respondent respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari.

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NO. 95-1094

In The
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DARELENE BANFIELD, Executrix of the Estate of
Harlow F. Banfield, et al.,

Petitioners,

v.

KENNETH W. TURNER, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Is summary judgement appropriate when the petitioners have presented evidence to raise a question for the jury as to the extent of an anticipated benefit by a plan participant who transferred funds to a defined benefit pension plan when such funds were used to satisfy all plan obligations?

Did the Court of Appeals require a party opposing a motion for summary judgement to show an improper higher standard by requiring that the "evidence submitted by the nonmoving party must be sufficient for a jury to be able to decide in its favor" when this Court has held "all that is required is that sufficient evidence support the claimed factual dispute be shown to require a jury to resolve the parties, differing versions of the truth"?

Is summary judgement appropriate when the evidence relied upon by the Court and Respondents (Moskal Report) is subject to varied interpretation; contains inferences which are contradictory; and on its face contains calculations which have obvious omissions?

Is summary judgement appropriate when the Court of Appeals set forth a

limited statement of the cases "fraud, breach of contract, misappropriation, and no failure to stop known breaches of duty by other fiduciaries" when other causes of action including improper funding of the plan, failure to establish separate beneficiary accounts, equity, negligence, and subjecting a plan beneficiary to contingent tax liability have been factually established by the nonmoving party, contradicting the moving parties evidence?

Does the moving party have the ultimate burden of proof, and did it show, as a matter of law that the establishment of a qualified plan complied with all substantive law including the leased employees status, assignment of income doctrine and that the fiduciaries of the plan did not subject the plan participants to contingent income tax liabilities, to foreclose all material fact inferences?

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No.95-1094

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DARLENE BANFIELD, Executrix of the Estate of Harlow F. Banfield, et al.,
PETITIONERS
v.
KENNETH W. TURNER, et al.,
RESPONDENTS.

On Petition for a Writ of Certiorari To United States Court Of Appeals For The Sixth Circuit

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PETITIONER'S REPLY BRIEF

Respondents' lack of substantive argument highlights why this Court should grant the petition. They have failed to dispute, thereby concede, the factual and legal basis of the claim that an assignment of income occurred; that via I.R.C. § 401 only "employers" may contribute to a plan; and that the plan was equitable. The burden of proof is on Respondents to show they are entitled to summary judgement as a matter of law, for it is the moving party burden of showing the absence of any genuine issue of material fact. In re Data General Corp. Ameritrust Litigation (1980), 490 F.

Supp. 1089. They have failed to do so. Their continued defiance to defend their position is so obvious as to submit briefs void of any plausible argument; (1) to defend against Lucas v. Earl (1930), 281 U.S. 111 or contradict Miller's admission of an assignment; nor (2) defends any of the elements in I.R.C. § 414(n) "leased employee". Professional & Executive Leasing Inc., v. Commr. (1988, 9th Cir.), 862 F.2d 751. The Court below viewed the funding as "illegal", yet did not resolve assignment vs. leased employee status; that issue is ripe for resolution.

The issues presented create a paradox of great public interest. If certiorari is not granted, this Court will condone fiduciary conduct having pervasive negative impact on federal tax law. If this Court grants certiorari and believes the fiduciaries acted properly, it must overrule the time honored first principle of federal tax law that assignment is not permissive and that I.R.C. § 401 mandates that only an employer can fund a pension. The resolution of the paradox is to grant certiorari, affirming Lucas, supra.

REPLY TO RESPONDENT THOMPSON

The lack of argument is an indicia that Respondents can not remotely defend

their conduct in light of substantive tax law. Any defense of the assignment is at a cost; (1) to concede Miller's admission of the assignment; (2) failure to support the leased employee status; and (3) that the assignment caused tax liability. The assignment was done by Miller's yearly nonreporting of income and Thompson's annual failure to create a separate account causing Banfield injury, which they both concurred and exercised discretionary authority. The breach of duty to stop the assignment or earmark the funds to the Banfield's sole benefit unjustly enriched Turner. Their argument still fails (1) to account for pension savings and checking account balances, (2) to defend a plan underfunding allocated to only two participants.

Despite the Respondents' simplistic denial, the decisions below conflict with: (1) Lucas, supra. not argued in any brief; (2) that a sole proprietor can not contribute to the plan of another employer, to which such sole proprietor is not an employee of the plan and the other business entity is not the employer of the sole proprietor. Peckman v. Board of Trustees(1981, 10th Cir.), 653 F.2d 424, 427 statutory mandate of ERISA 29 U.S.C. § 1103 (c)(1) prohibits proprietors from having the dual status of employer-employee for purposes of ERISA; (3) Federal Courts equitable

powers to award restitution in ERISA cases where principles of equity make such an award appropriate. Kwatcher v. Mass. Service Emp. Pension Fund(1989, 1st Cir.), 879 F.2d 957; (4) plan participants are liable to one who erroneously funded the plan. Fortune v. Medical Assoc. of Woodhill P.C.(1992, E.D. NY), 803 F. Supp. 636; (5) the foreseeability of failure of purpose (i.e. a transfer to a defined benefit plan does not solely benefit the transferor), and the certainty in negligence (i.e. an assignment). Anoke Orthopedic Assoc, P.A. v. Mutschler(1991, D. Minn), 773 F. Supp. 158

REPLY TO RESPONDENT TURNER

The jury question is to what extent did Banfield intend to be benefitted? Mrs. Banfield's stated "to get a bigger piece of the pie". Herr and Jaras state other options should have been used. The Gallagher admits a voluntary saving option was available but unused. The lower courts placed reliance on the Moskal Report that has inherent factual and legal flaws. The report erred in underfunding only two participants; booked loans years after the loan was taken; and more importantly, the inferences drawn by Respondents have serious logical flaws. The argument is an equitable one: that "contributions

equal benefit". However, the report calculated what was left to distribute at termination. Turner's 38% final plan distribution did not include the $70,000 loans and $310,857 annuity that he had already taken out. If those items are put back into the computation, it clearly indicates inequity. Also, calculations excluded Banfield's transfers (App. 48):

Banfield	Banfield	Turner	Total
$272,384	533,338	327,677	861,015
(not incl)	62%	38%	100%

The plan benefits under the formula:

	Banfield	Turner
Pension	413,288	309,120
Integrated	292,947	346,521
Total	706,235	655,641

The 1977 integrated plan provided a greater benefit to Turner. Is it arbitrary that Turner, a plan fiduciary, pass favorable judgement to allow transfers to satisfy all plan costs, resulting his windfall or would equity require those transfers benefit Banfield?

This Court in reviewing a claim must accept Petitioner's version of the facts, since the District Court was required to resolve all genuine disputes as to material facts in plaintiff's favor in granting summary judgement. Bishop v. Wood(1976), 426 U.S. 341; Fed Rule Civ

Proc 56(c). Rule 56(e) permits a summary judgement to be opposed by any of the kinds of evidence in 56(e) including depositions. The material fact required by Rule 56(e) to be present to entitle a nonmoving party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence (emphasis added); rather; all that is required is that sufficient evidence support the claimed factual dispute be shown to require a jury to resolve the parties, differing versions of the truth at trial and must set forth facts showing the existence of a genuine issue for trial. First Nat. Bank v. Cities Service Co. (1968), 391 U.S. 253. The Court below held that "the evidence submitted by the nonmoving party must be sufficient for a jury to be able to decide in its favor", that contradicts First Nat. Bank, supra.

In reversing a summary judgement in Adickes v. S. H. Kress & Co.(1970), 398 U.S. 144, this Court stated: "... Our own scrutiny of the factual allegations of petitioner's complaint as well as the material found in the affidavits and depositions ..., however, convinces us that summary judgement was improper... it is useful to state the factual arguments ... that the sequence of events created a substantial possibility of a conspiracy ... given that the noncircumstantial

evidence of the conspiracy could only come from adverse witnesses...". The same is true here.

The complaint alleged at Par 19- "failed to segregate; give credit to, or account ... for amounts transfer into the pension for Banfield's benefit from the Private Practice Income; failed to properly prepare income tax returns..., and appraise the...contingent tax liability."; Par 20 "failed to disclose ...that transfers...would not increase his retirement benefits since the plan was a defined benefit plan."; Par 25 "failed to segregate those funds for ... or establish a separate employee contribution accounts"; Par 25 "Co-mingled" and "subjected these funds to the general liabilities of plan" ; Par 28 "unjustly enriched Turner" and the prayer for relief included "such other equitable relief as this court may find appropriate ...". All were argued below. The Courts below limited the issues to "fraud, misappropriation or breach of contract by Turner that he knowingly failed to stop." It is clear that the allegations and factual support go beyond this limited statement of the case. The Court below did not require Respondents' to carry their burden, per Adickes, supra, due to a failure to foreclose the possibility of a material fact. Here, the motion did not preclude the existence of improper

funding, or the other factually supported allegations above including exposure to tax liability upon assignment.

Depositions of Gallagher failed to support the claim of leased employee and Miller admitted the assignment of income contra to the leased employee theory and contra to the Mrs Banfield's affidavit that the transfer was classified as a gift; Gabbert and Bennett indicated Dr. Banfield retained control of the private practice which is contra to the leased employee theory; Bennett's deposition of amicable relationship of the doctors contested by Gabbert and Mrs. Banfield; These facts indicate that summary judgement was improper.

The Court of Appeals summarily disregarded the evidence and gave no weight to contradictory depositions; Tax Shelter Proposal; the Herr (stating funding was not proper), Banfield, and Jaras (contradicting the contributions equals benefits conclusion) affidavits; the conflicting facts of the Jaras Report, and refused to apply Lucas, supra. or I.R.C. § 414.

REPLY TO RESPONDENT MILLER

Preemption requires federal jurisdiction of all common law contract and tort claims if the factual basis of

the cause of action involves a qualified plan. Metropolitan Life Ins. Co. v. Taylor(1987), 481 U.S. 58. The consequences of the transfer are all claims involving the plan. State law claims against pension advisors for liability, tort, misrepresentation and calculations were preempted by ERISA and therefore properly before the federal court, included claims of reliance on accountants. Brock v. Self(1986, W.D. La) 632 F. Supp. 1509; See 28 U.S.C. § 1331 claims which "relate to" plans; pendant jurisdiction is appropriate over state law claims under plausible federal claims, Measen v. Bank of Miami(1981, 5th Cir.), 652 F.2d 542.

The material factual disputes exist about Miller's services as intended to benefit Banfield. Without, albeit the improper, assigned income and the failure to report income, the plan could not be carried out. The harms foreseeability in assigning income, and the certainty of the negligence is a jury question. Anoka Orthopedic Associates, P.A., supra.; 29 U.S.C. §§ 1132(a)(2) and 1109(a) Congress took a functional approach to defining a fiduciary under ERISA. Those responsible for formulating a plan were fiduciaries Miller v. Lay Trucking Co. (1985, ND Ind), 606 F. Supp. 1326; Eaton v. D'Amato(1980), 581 F. Supp. 743; Mutual Life Ins. Co. v. Yampol(1980), 840 F.2d

421; advisor aware of conflicting loyalties Leigh v. Engle(1984, Ca 7 III) 727 F.2d 113. Miller denied the prior attempt to classify the transfer as a gift. Mrs. Banfield affidavit alleges Miller classify the transfer as a gift, raising the issue of intent. Finally, Miller's brief states: "...Even if Petitioner's contentions as to alleged improper accounting and improper source of contributions have merit..., these respondent's have no liability." The above, despite the standardized denial without proof of compliance as a matter of law, confirm the unresolved issues. Miller in attempting to pass liability for possible meritorious claims on another party, confesses his own doubt.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition be granted.

Darlene Banfield, Exec. of the Estate of Harlow Banfield; Darlene Banfield

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